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7

8 **UNITED STATES DISTRICT COURT**
9 **NORTHERN DISTRICT OF CALIFORNIA**
10

11 MICHAEL ZELENY,

12 Plaintiff,

13 vs.

14 GAVIN NEWSOM, *et al.*,

15 Defendants.
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Case No. CV 17-7357 JCS

Assigned to:

The Honorable Richard G. Seeborg

Discovery Matters:

The Honorable Thomas S. Hixson

**DECLARATION OF BRIAN R. ENGLAND
IN OPPOSITION TO MOTION TO
DISMISS AND IN SUPPORT OF
REQUEST FOR MONETARY
SANCTIONS IN THE AMOUNT OF \$9,192.**

Date: January 6, 2022

Time: 1:30 p.m.

Courtroom: 3, 17th Floor

Action Filed: December 28, 2017

Trial Date: None Set
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DECLARATION OF BRIAN R. ENGLAND

I, Brian R. England, declare:

1. My law firm and I are counsel of record to Plaintiff Michael Zeleny (“Zeleny”) in this matter. I have personal knowledge of the facts below or knowledge based on the records and files of my firm maintained in the ordinary course of business. I could testify competently to these facts if called upon to do so.

2. Affeld Grivakes LLP reasonably incurred in excess of 16.5 hours in reviewing the City’s Motion, conducting legal research and analysis, and drafting this Opposition. That included six hours for me, 5.5 hours for Damion Robinson, and 5 hours for Adeline Black. My hourly rate is \$695, Damion Robinson’s is \$595, and Ms. Black’s is \$350. All in, that amounts to \$9,192 in fees and costs opposing this Motion.

3. Attached hereto as Exhibit A is a true and correct copy of relevant of the deposition transcript of Dave Bertini, taken in this case March 19, 2019.

4. Attached hereto as Exhibit B is a true and correct copy of a letter from Damion Robinson to the City’s counsel dated October 12, 2021 regarding this Motion and the lack of merit.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed this 13th day of December, 2021 at Los Angeles, California.

/s/ Brian R. England
Brian R. England
Declarant

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EXHIBIT A

1 UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF CALIFORNIA

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4 IN RE MATTER OF:)
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6 MICHAEL ZELENY,)
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7 Plaintiff,)
)
8 vs.) CASE NO. CV 17-7357 JCS
)
9 EDMUND G. BROWN, JR., et al.,)
)
10 Defendant.)
)

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13 VIDEOTAPED DEPOSITION OF CHIEF DAVE BERTINI

14 VOLUME I

15 Menlo Park, California

16 Tuesday, March 19, 2019

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22 Stenographically Reported by:

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24 HEATHER J. BAUTISTA, CSR, CRR, RPR

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1 VIDEOTAPED DEPOSITION of CHIEF DAVE BERTINI,
2 taken before Heather J. Bautista, CSR No. 11600, a
3 Certified Shorthand Reporter for the State of
4 California, with principal office in the County of Santa
5 Clara, commencing on Tuesday, March 19, 2019, 10:07
6 a.m., at 1100 Alma Street, Suite 210, Menlo Park,
7 California 94025.

8

9 APPEARANCES OF COUNSEL:

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11 For the Plaintiff:

12 Affeld Grivakes LLP
13 BY: DAMION ROBINSON, ESQ.
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For the Defendant:

17

Howard Rome Martin & Ridley LLP
18 BY: TODD H. MASTER, ESQ.
1900 O'Farrell Street
19 Suite 280
San Mateo, California 94403
20 Phone: (650) 365-7715 / Fax: (650) 364-5297
tmaster@hrmlaw.com

21

22 ALSO PRESENT:

23 Nick Perry, Videographer

24 Michael Zeleny, Plaintiff

25

1 **Q.** (By Mr. Robinson) My question was more
2 specific than that, though. If Mr. Zeleny -- as the
3 person most qualified on behalf of the City of Menlo
4 Park, in relation to these protests, if Mr. Zeleny wants
10:20 5 to go today and protest against NEA and carry unloaded
6 firearms openly, is he allowed to do that within the
7 city of Menlo Park?

8 MR. MASTER: Same objections.

9 You can answer.

10:20 10 THE WITNESS: Our -- the interpretation of the
11 Penal Code is no, he would not be. It is illegal to
12 openly carry unloaded weapons in the state of
13 California.

14 **Q.** (By Mr. Robinson) What would the consequences
10:20 15 be if Mr. Zeleny undertook his protests carrying open,
16 unloaded firearms?

17 **A.** We would look at the situation. We would
18 determine whether we believed a crime was occurring, and
19 if we established that probable cause that a crime was
10:21 20 occurring, an arrest could be made.

21 **Q.** Who would be the person on the behalf of the
22 City of Menlo Park Police Department to decide whether
23 or not to make an arrest in that situation?

24 **A.** Police officer.

10:21 25 **Q.** So assuming that Mr. Zeleny went to NEA today

1 or some other day and resumed his protests while openly
2 carrying unloaded firearms, he would be subject to
3 arrest; true?

4 A. That's true.

10:21 5 Q. Is there any way in which Mr. Zeleny can engage
6 in that protest through permits or some other process
7 where he could do those protests while openly carrying
8 firearms and not be subject to a risk of arrest?

9 A. There is an exception to the Penal Code that
10:22 10 allows someone who is in an authorized production to
11 carry weapons and if Mr. Zeleny had a authorized
12 production permit from the City, then -- and as long as
13 he fulfilled the rest of the requirements in that
14 permitting process, he would be allowed to do so.

10:22 15 Q. When you're talking about a production permit,
16 is that a film production permit?

17 A. Correct.

18 Q. Other than getting a film production permit
19 from the City, are there any other circumstances in
10:22 20 which Mr. Zeleny could conduct his protests involving
21 the use of firearms without being subject to arrest?

22 A. I'm not aware of any.

23 Q. So the film production permit is basically the
24 only option within the city?

10:23 25 A. Well, it seems to be one of the exceptions to

1 THE WITNESS: Repeat it.

2 Q. (By Mr. Robinson) By the definition you just
3 gave me, Mr. Zeleny's special event that he was
4 proposing, because he didn't have some other kind of
10:29 5 permit, would meet your definition of an event that was
6 special by its very nature; true?

7 A. Believe the City's -- as I stated, I believe
8 the City's stats on that was that you don't need a
9 special events permit to, in fact, protest.

10:30 10 Q. At this point -- let me step back a second.
11 You understand that there is an exception to the
12 California Penal Code sections about open carry for
13 entertainment events; true?

14 A. For an authorized production; correct.

10:30 15 Q. Are you aware of the exception that applies to
16 authorized participants in entertainment events?

17 A. An authorized event, yes.

18 Q. Okay.

19 Is there any other mechanism by which the City
10:30 20 of Menlo Park authorizes events, other than the special
21 event permit process?

22 A. The film permit.

23 Q. Okay.

24 So the two options, essentially, are film
10:30 25 permit and special events permit for events; true?

1 MR. MASTER: I'll just object to the extent
2 that you're asking him to potentially answer questions
3 that go beyond the scope of his designation.

4 But to the extent he has an understanding, he
10:31 5 may.

6 THE WITNESS: I'm sorry.

7 Q. (By Mr. Robinson) Let me step back for a
8 second. It's the City's view -- and I'm asking about
9 Item 4 on Attachment 1, the defendant's interpretation
10:31 10 of the California statutes.

11 It's the City's position that in order to be an
12 authorized participant either in a video production or
13 an entertainment event, the City has to authorize the
14 event itself?

10:31 15 A. That's correct.

16 Q. And the way in which the City would authorize
17 an event of the type that Mr. Zeleny was seeking to
18 conduct would be either through a special events permit
19 or a film permit; right?

10:31 20 A. Those are the only two that I'm aware of.

21 Q. Okay.

22 And at the time Mr. Zeleny applied for the
23 special events permit, you're aware that he didn't have
24 a film permit; correct?

10:32 25 A. Correct.

1 police regulation, monitoring, or control," in your
2 view, the event that Mr. Zeleny filed his application
3 for satisfied that criteria; correct?

4 A. Yes.

13:23 5 Q. So to summarize, at least three of these bullet
6 points would be triggered by Mr. Zeleny's proposed
7 special event permit; correct?

8 A. Yes.

9 Q. And under the definition set out in the FAQ, if
13:24 10 an event meets any one of these criteria, it qualifies
11 as a special event requiring a permit; true?

12 A. Requires you to complete a special event
13 application.

14 Q. Is the City -- is the definition in this FAQ of
13:24 15 what qualifies as a special event the City's definition
16 of a special event?

17 A. Yes.

18 Q. So under this -- at least under the published
19 FAQ, Mr. Zeleny's event would qualify as a special event
13:24 20 on at least three criteria; correct?

21 A. Yes.

22 Q. Let me have you turn to the page that's marked
23 MP1820. There's the section titled "What would cause a
24 permit to get denied?"

13:25 25 Do you see that?

1 attempting to come to a conclusion with as far as his
2 second permit.

3 Q. Part of your answer related to Mr. Zeleny
4 asserting that he has the right to engage in the
15:30 5 protests without -- or to engage in an entertainment
6 event or to film his protests as part of a video
7 production without the City's authorization; is that
8 accurate?

9 A. That is my understanding of what he has alleged
15:30 10 or he has said.

11 Q. As the person most qualified on behalf of the
12 City of Menlo Park, is he correct in that assertion?

13 A. In the assertion -- no; that he can't -- hold
14 on.

15:30 15 Go back and tell me the assertion again.

16 Q. Sure. Is it accurate that Mr. Zeleny can
17 engage in his activities with unloaded firearms without
18 some kind of permit from the City?

19 A. That is not correct.

15:30 20 Q. Okay.

21 So you disagree with his assertion?

22 A. That's correct.

23 Q. And assuming that he did that, we've talked
24 about this before, and I don't want to belabor it.

15:30 25 Assuming that he did that, he would be subject to

1 prosecution?

2 A. He may be subject to arrest and prosecution.

3 Q. And if I understood you correctly, Mr. Zeleny
4 is manipulating the process by applying for the permits;
15:31 5 is that correct?

6 A. Yes.

7 Q. Okay.

8 So the City disagrees with him -- strike that.

9 In the City's view, Mr. Zeleny needs the

15:31 10 permits in order to use the guns in the protests -- in
11 the entertainment event, the protests, the video,
12 whatever it is, he needs a permit; correct?

13 A. In order for the exception to be applicable, he
14 has to be involved in a permitted activity, yes.

15:31 15 Q. And in your view, Mr. Zeleny is manipulating
16 the process by applying for the permits he needs to
17 engage in that activity?

18 A. Based on his own words, yes.

19 Q. Going on to the next paragraph in Exhibit 44,
15:32 20 there is a reference to continuing to be in close
21 contact with security from NEA.

22 Do you see that?

23 A. I do.

24 Q. Do you have an understanding of how -- for what
15:32 25 period of time the City of Menlo Park was in contact

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EXHIBIT B

AFFELD GRIVAKES LLP

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dr@agzlaw.com

October 12, 2021

Todd H. Master, Esq.
Robert Gundert, Esq.
Howard Rome Martin & Ridley LLP
1900 O'Farrell Street, Suite 280
San Mateo, CA 94403

Via FedEx

Re: *Zeleny v. Newsom, et al.*, N.D. Cal. Case No. 17-7357
Proposed Motion for Reconsideration

Gentlemen:

According to your Settlement Conference Statement, you plan to file a Motion for Reconsideration, asking the Court to “reconsider its implied ruling that plaintiff has standing to challenge the City’s special event permit process[.]” We hope that this is merely settlement posturing. Such a motion would violate the City’s and counsel’s obligations under Rule 11.

The Court did not make an “implied ruling” about standing. It made an explicit ruling, which undermines your argument:

Because Zeleny challenges the permitting processes as facially invalid prior restraints, ***his standing is not a function of his having “appl[ie]d for, and be[en] denied” any one particular permit.*** See *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 755-56 (citations omitted). So long as the processes remain in place and controlling over any future application he might submit, his claims against Menlo Park are justiciable.

Order dated 7/13/2021 (Dkt. No. 192) at p. 13 (emphasis added). Further, you made this exact argument in opposing our Motion for Partial Summary Judgment:

It is apparent from these documents that describe the City’s SEP policy ... that the SEP process was designed for community-related activities of a social and/or recreational nature. Consistent with that, plaintiff was told repeatedly that the SEP process did not apply to his proposed protest and that he did not need a permit to protest.

Todd Master, Esq.
Robert Gundert, Esq.
October 12, 2021
Page 2 of 2

Opp. to Mot. for Summ. J. (Dkt. No. 168) at p. 21.

There are no new facts or new law here. The Court properly rejected your argument under binding authority, including *City of Lakewood*. In addition, any Motion for Reconsideration would be several months late. We urge you not to waste any more time with frivolous motion practice.

Sincerely,
s/ Damion Robinson
Damion Robinson